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No. 76-51

In the Supreme Court of the United States

OCTOBER TERM, 1976

GOODFRIEND WESTERN CORP., D/B/A
WRANGLER WRANCH, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-27) is reported at 535 F. 2d 145. The opinion of the district court (Pet. App. 28-38) is reported at 411 F. Supp. 454.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1976 (Pet. App. 25). The petition for a writ of certiorari was filed on July 15, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the pre-trial disclosure of statements of employees and their representatives obtained by the National Labor Relations Board in the investigation of a pending unfair labor practice case would "interfere

with enforcement proceedings," so that the statements are exempt from disclosure, under Exemption 7(A) of the Freedom of Information Act.[1]

STATUTES INVOLVED

The full text of the Freedom of Information Act, as amended, 5 U.S.C. 552 ("the FOIA"), and the relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519), 29 U.S.C. 151, *et seq.* ("the NLRA"), are set out at pp. 39-48 of the petition.

STATEMENT

A. The Unfair Labor Practice Proceeding

On October 3, 1975, Local 1291, Retail Store Employees Union, associated with Retail Clerks International Ass'n, AFL-CIO ("the Union") filed an unfair labor practice charge with the First Region of the National Labor Relations Board ("the Board"). The charge alleged that Goodfriend Western Corporation ("the Company") had violated Section 8(a)(1), (3), and (5) of the NLRA, 29 U.S.C. 158 (a)(1), (3), and (5) by, *inter alia*, interrogating its employees concerning their union activities, restraining their access to union organizers, threatening them with discharge because they wished to join the Union, discharging approximately twelve employees because of their

[1]The same question is presented in *Title Guarantee Co.* v. *National Labor Relations Board*, No. 75-1880, pending on petition for a writ of certiorari.

The petition also seeks to raise (Pet. 2) the additional question whether the above-described statements are exempt from disclosure under Exemptions 7(C), 7(D), and 5 of the FOIA. In view of its holding that the matter sought herein was protected against disclosure by Exemption 7(A), the court of appeals had no occasion to reach these additional questions. However, should the petition be granted, we reserve the right to argue that the matter sought is also protected by Exemptions 7(C), 7(D), and 5.

union activities, and refusing to bargain with the Union, which had been designated as the collective bargaining representative of a majority of the employees. On December 3, 1975, the Regional Director, after investigation of the charge, issued a complaint, and set it for hearing on February 24, 1976.

By letter of December 29, 1975, the Company, pursuant to the FOIA, requested that the Regional Director make available for inspection and copying, "all written statements, signed or unsigned, contained in the Regional case file, resulting from Board interviews of witnesses offered by the charging party or otherwise resulting from investigation of the charge" (Pet. App. 55). The Acting Regional Director, by letter of December 30, 1975, denied the Company's request on the grounds that the information was privileged from disclosure by Exemptions 7(A), (C), and (D) of the FOIA, 5 U.S.C. 552(b)(5)(A), (C), and (D). The Company appealed to the Board's General Counsel. On February 2, 1976, the General Counsel denied the appeal for substantially the reasons given by the Acting Regional Director and for the additional reason that the information was privileged from disclosure by Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5) (Pet. App. 56-58).

B. The FOIA Suit

Thereafter, the Company filed this suit to compel production of the statements and to enjoin the Board from proceeding in the unfair labor practice case until the requested information was made available. The district court, after hearing argument and making an *in camera* inspection of the requested statements,[2] ordered the

[2]The Company acknowledged that it sought only the affidavits of witnesses whom the Board intended to call at the scheduled hearing before the Administrative Law Judge (Pet. App. 33-34).

Board to turn them over to the Company, and enjoined the Board from proceeding with its unfair labor practice proceeding until it had done so (Pet. App. 28-29).

On the Board's appeal, the court of appeals reversed (Pet. App. 25-27). The court adopted the holding of the Second Circuit in *Title Guarantee Co. v. National Labor Relations Board*, 534 F. 2d 484, that "all statements of employees obtained in connection with unfair labor practice proceedings pending before the NLRB are exempt from disclosure under §552(b)(7)(A)" (Pet. App. 26). The court rejected the Company's argument that this case was factually distinguishable from *Title Guarantee*, in that here the district court's order was limited to statements of witnesses who had already committed themselves to testifying at a hearing that was scheduled to take place twenty-four hours after the order was issued. The court of appeals stated (Pet. App. 27):

> Even in this case we cannot rule out all possibility that the company may "be able to use disclosure to learn the Board's case in advance and frustrate the proceedings * * *." *Title Guarantee, supra*, slip op. at 2971. More important, whether such a possibility justifies denying all discovery of an employee's statements until after he testifies is a question that Congress has left to the Board.

ARGUMENT

This case presents the same issue presented in *Title Guarantee Co. v. National Labor Relations Board*, No. 75-1880, pending on petition for a writ of certiorari (see note 1, *supra*): whether the statements of prospective Board witnesses in a pending unfair labor practice case are protected against disclosure by Exemption 7(A) of the

FOIA. For the reasons set forth in the Board's brief in opposition in *Title Guarantee*,[3] there is likewise no occasion for further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1976.

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[3]We are serving petitioner with a copy of the Board's opposition in *Title Guarantee*.

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